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IN THE

Supreme Court of the United States

OCTOBER TERM.

No. 554.

EUREKA LODGE NO. 6, INDEPENDENT ELKS (now EUREKA LODGE MODERN ELKS), JERRY O. GILLIAM, and WALTER C. FULFORD,

Petitioners,

VERSUS

GRAND LODGE OF IMPROVED, BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE WORLD, a Corporation,

Respondent.

RESPONDENT'S REPLY AND BRIEF IN OPPOSITION TO PETITION.

PERRY W. HOWARD,
Washington, D. C.

W. C. HUESTON,
Washington, D. C.

W. W. FOREMAN,
Norfolk, Virginia.

T. H. REED,
Norfolk, Virginia.

WALTER H. LAND,
Norfolk, Virginia.

J. C. ROBINSON,
Richmond, Virginia.

BYRON S. ADAMS, LAW PRINTER,
WASHINGTON, D. C.
CHARLES W. DARNELL, SUPERINTENDENT OF PRINTING.

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versus

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Respondent.

RESPONDENT'S REPLY AND BRIEF IN OPPOSITION TO PETITION.

Authorities and Argument.

Respondent presents that an examination of the transcript of the record, presented here by the petitioners, and the authorities thereon, when given the most liberal interpretation discloses that the case presented by the petitioners

herein does not come within the class of cases for which the Writ prayed for will be granted. This Writ has been granted as a rule only when matters concerning administrations of Public Officers and Public Boards of political units were involved.

The petitioners in their petition undertake to inform this Honorable Court that this Writ should be granted because, they "claim that the question of whether or not they may use the word 'Elks' in their name is of great importance to them and of great importance to vast numbers of other persons in the United States calling themselves Elks and to other organizations and businesses."

In testing this statement, we first wish to make clear to this Honorable Court, that the refusal of this Writ in no wise interferes with the rights of the White organization known as the Benevolent Protective Order of Elks, for the question of the right of the Respondent to use the word Elks in its name was settled by agreement between the White Elks. (See the Testimony of J. Finley Wilson on Page 192 of the Transcript of the Record herein.)

This agreement has been recognized and acquiesced in by the two Orders hereinabove referred to, the public and the courts. (See Grand Lodge of Improved, Benevolent and Protective Order of Elks of the World v. Grand Lodge Improved, Benevolent Order of Elks of the World, Inc., *et al.*, 4 Cir. 50 F. Ind. 860.)

The Respondent cannot see how the decision of the United States Circuit Court of Appeals, "will be of great importance to other organizations and businesses" for the reason, that it only refers to the use of the distinctive

word "Elks" in the name of a fraternal organization. Certainly the decision sought to be mandated against does not restrict the use of the word as against any other enterprise whatsoever and the Respondent does not so claim.

As to the decision being of great importance to vast numbers of persons calling themselves "Elks" except the Petitioners and the Respondent, the Respondent urges that it is composed of more than fifteen hundred units, with a membership of more than one hundred thousand (See sworn complaint of Respondent—Page 2—of the Transcript Record) and the Petitioners have about four hundred members (See Findings of Fact—Page 3—of Petitioners' Petition herein). That out of the one hundred thousand members of the Respondent against which the petitioners complain only four hundred, and they are those who they claim to represent, are heard to protest against the exclusive use of the word "Elks" by the Respondent as a full and complete examination of the transcript of the record will disclose. And at this point the Respondent urges, that the Petitioners are only excluded from the use of the word "Elks" in their name, by the decision sought to be mandated, so long as they themselves insist by their actions in continuing to be suspended from the Order of the Respondent.

Respondent suspended the Petitioners from its Order because they refused to pay, and agreed to by them, per capita tax, (See J. Finley Wilson's Testimony—Page 182 of the Transcript of Record herein) and under the rules and regulations of the Respondent, shall be restored to it when it has paid the per capita tax for which it was suspended, plus accruing taxes during said suspension, plus a penalty not to exceed Two Hundred Dollars ($200.00) for permitting

itself to be suspended. (See Constitution and By-Laws of Respondent, page 28 of the Transcript of Record herein.)

While the Petitioners sought to contend that they had seceded, it is significant in support of Respondent's contention that Petitioners continued membership unprotestingly for more than a quarter of a century, paid its per capita tax, etc., and did not make an effort to amend its charter until October, 1939, about two months after Respondent suspended it in August, 1939. (See Certificate for Amended Charter by Petitioners—Page 99 of Transcript of Record.) The fact that they were suspended was testified to by one of their counsel here appearing, who was a member at the time of the suspension of the Petitioners, (See Testimony of E. S. Peters—Page 118—Transcript of Record herein) so that we urge that failure of this Honorable Court to grant Writ as prayed for by the Petitioners will not even be fatal and final to them so far as the use of the word "Elks" is concerned and, therefore, not of great importance within the meaning of the rule upon which petitioners attempt to rely for the issuance of the writ.

Moreover, this suspension arose out of the petitioners attempting to suppress the number of their membership in the payment of their per capita tax after they had been members of the respondent Order for more than twenty-five (25) years (See Testimony of W. W. Foreman—Page 174—of the Transcript of Record) and read in this light—"The suspension was a matter of discipline with which the courts in the petitioners state as well as others will not interfere." (Campbell vs. Brotherhood *et al.*, 161 S. E. 144.)

Respondent urges that it is well settled that fraternal and similar organizations will be protected in the use of the distinctive words in their names. The United States Circuit Court of Appeals, speaking through Judge Parker in the instant case simply reaffirmed this well established principle of law.

SEE: Emory v. Grand United Order of Odd Fellows, 140 Ga. 423, 78 S. E. 922.

Knights of Maccabees v. Searle, 75—Neb. 285, 106 N. W. 448.

Grand Lodge Improved, Benevolent and Protective Order of Elks of The World v. Grand Lodge, Improved, Benevolent and Protective Order of Elks of the World, Inc., *et al.*, *Supra.*

St. George Lodge K. of P. v. Rosenthal (Excerpt set out in case next above quoted).

Society of War 1812 v. Society of the War of 1812, 46 App. Div. 568, 62 N. W. Supp. 355.

National Circle Daughters of Isabella v. National Order of Daughters of Isabella, 270 Fed. 273.

International Committee of Young Womens Christian Association v. Young Womens Christian Association, 194 Ill. 194, and many other cases which we feel unnecessary to cite.

Hence, the respondent will be sustained in the exclusive use of the word "Elks" in its name as against the petitioners and all hereinafter similarly situated.

As to further argument upon this point, the respondent relys upon the well stated opinion of Judge Parker in the instant case, which is to be found in the Transcript of the Record beginning on Page 248, because it is much better stated

therein than we can state it here, together with the case Grand Lodge Improved, Benevolent and Protective Order of Elks of the World v. Grand Lodge Improved, Benevolent and Protective Order of the Elks of the World, Inc., *et al.*, *supra*, respondent calls the court's attention to the fact that since the court sought to be mandated rendered its decision in the last case cited about ten years ago.

The issue herein controverted has been well settled, the last as stated therein accepted as the weight of authority of the issues herein involved and the courts have been free of litigation raising this issue. For no case cited by counsel on either side herein is junior in point of time to case referred to.

Respondent urges that to upset this well established principle will cause inextricable confusion in that in this as well as in all other similar organizations whenever persons or groups become dissatisfied for any cause whatsoever with the administrations of said associations. A multiplicity of secessions from them will be had and many organizations will be set up using as part of their names the distinctive word of the parent-organization, thus causing great confusion both among the public and the organizations. When this is likely to be the outcome of the granting of the writ, it will be denied.

14—Corpus Juris Secundus, Page 140 and cases cited thereunder.

Respondent presents that a reading of the whole record shows that the petitioners have not been injured and no manifest injustice has been done them, the case being, in fine, that they were discovered suppressing the number of their members by what is called by respondent, a Dis-

trict Deputy Grand Exalted Ruler, that they became incensed with him, demanded his removal, not having their wishes complied with they became angered, did not pay their proper per capita tax, and in compliance with its Law made and provided therefor, respondent suspended them.

SEE: W. W. Foreman's Testimony beginning on Page 174 of Transcript of the Record. The writ prayed for will not be granted under these circumstances. (See Corpus Juris Secundus 14 —Page 140.)

The whole purpose of the petitioners is to set up and operate a rival organization, using a name with the respondent's distinctive word "Elks" for the purpose of deceiving prospective members and the public into the belief that they are either members of respondent or confusing the identities of the organizations so as to get the benefit of the labor and effort of the respondent acquired by it during many years of enterprise and endeavor.

SEE: Respondent's Exhibit No. 4—on Page 170 A and B, as well as Respondent's Exhibits D on Pages 91, 92, and 93 of the Transcript of Record herein.

Respondent submits that through the years it has engaged in and carried on an extensive welfare program, wherein it has educated several hundred colored youths, operated Health Clinics, Athletic and Civic Departments and continues so to do (See J. Finley Wilson's Testimony, *Supra).* That in doing this, it has acquired a reputation for good among those with whom it seeks to serve and to

secure as members of its Order and is entitled to the benefit of this reputation uninterfered with. That petitioners seek to deprive respondent of this benefit and therefore apply for this writ. Under these circumstances it is respectfully urged that the writ applied for be denied.

Your respondent submits that every question raised in the petition of the petitioners was raised in the court below, carefully considered by it and unanimously decided against them. The court sought to be mandated, had before it the three cases offered by the petitioners, carefully considered them, and in accordance with the weight of authority, decided that said cases did not sustain the contention of the petitioners. (See cases herein above cited.)

Petitioners cite and rely upon Benevolent and Protective Order of Elks v. Improved Benevolent and Protective Order of the Elks of the World, 205 N. Y. 459; 98 N. E. 756.

We point out that even in this case the court held that plaintiff was entitled to the exclusive use of the word "Elks" in its name as being the distinctive word therein and then after so deciding as a matter of *obita dicta* used the words quoted in petitioners' petition, relying for its authority in so using upon the petitioners herein second cited case, namely:

> Supreme Lodge Knights of Pythias v. Improved Order Knights of Pythias, 113 Michigan 133; 71 N. W. 470.

Saying, but not adopting as follows:

> "The use of the parent name as part of the name of a new society formed by members of the original organization as an off-shoot thereof has sometimes been sanctioned."

The above cited Pythian case upon which petitioners rely is not only not accepted as sound by the weight of authority, but is based on reasons not in harmony with the issues in this case. The main fact in the Pythian case was that the parent Order had changed its policy in that it though having previously done so would no longer print its rituals in the German language, but henceforth only in English. The new society was composed of practically all Germans, many of whom could speak and read only in German. The court therein wrote a decision offering as its reason in refusing to grant an injunction against the new society this change in policy in order to avoid what it considered an unjust situation. It is to be observed, however, that in rendering this decision the court adopted the opinion of Judge Foster herein above referred to, which in effect is the exact opposite to holding in the Pythian case we are now discussing. This case is therefore unsound and not of value in support of petitioner's petition. So that, the New York case sustains the position of the Respondent and not the Petitioners. The Michigan Pythian case has been held as being unsound by many later decisions and is not in line with many others. (See Grand Lodge etc., *et al.* v. Grand Lodge etc., *et al., Supra;* Emory v. Odd Fellows, *Supra;* Knights of Maccabees v. Searle, *et al., Supra,* and all cases herein cited by Respondent.)

Petitioners cite as their third case in support of their application for this Writ, State Council of the Junior Order of United American Mechanics v. National Council, Jr., Order of United American Mechanics, 64 Atl. 56, and in so doing seek to give the impression that this case favors their position. An examination of this case shows that the contrary is true. In this case the defendant below, the National Council, etc., also sought to change the policy of the organ-

ization against an agreement not to do so unless sustained by a referendum vote, which the Constitution of the National Council required. This coupled with the fact that the State Council when incorporated by the State Legislature was given the authority to set up subordinate lodges and to do such things, as in the Respondent Order, is reserved entirely to it. The fact is the State Council in the case cited occupies the exact position in that case as the Respondent occupies in the instant case, and, therefore, sustains the contention of the Respondent herein. We agree that it does not make any difference in the Law in this case as to whether the Petitioners seceded or were suspended, except that if suspended their position is very temporary and can be immediately remedied by the Petitioners themselves and, therefore, they do not need the aid of the Writ prayed for to protect them.

Petitioners present as analogous matters, the fact that there are many religious organizations which have names very similar and point out that no opposition to this has ever been heard. The fact that no one has objected may be the very reason why the condition mentioned obtains. Freedom as to religion which embraces name, creed and ritual is in the foundation upon which this Nation stands, and, to the everlasting credit of these United States, no one is ever heard to object in any form so far as Religion is concerned, to what name, creed or ritual a person or group desires to use.

As to the reference to the secession of the States, that never really happened. The South attempted secession and the United States by force and arms prevented it. The Respondent sought to prevent disturbance and confusion

and sought the aid of the court in so doing; hence filed the original complaint in this action.

For the reasons herein above set out, the Respondent prays that the application by the Petitioners for a Writ of Certiorari be denied.

Respectfully Submitted,

PERRY W. HOWARD,
Washington, D. C.

W. C. HUESTON,
Washington, D. C.

W. W. FOREMAN,
Norfolk, Virginia.

WALTER H. LAND,
Norfolk, Virginia.

J. C. ROBINSON,
Richmond, Virginia.